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JOSEPH F. SPANIOLO, JR.
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No. 89-516

In The
Supreme Court of the United States
October Term, 1989

—◆—
WILBERT LEE EVANS,

Petitioner,

v.

CHARLES THOMPSON, SUPERINTENDENT,

Respondent.

—◆—
On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

—◆—
RESPONDENT'S SUPPLEMENTAL BRIEF
IN OPPOSITION

—◆—
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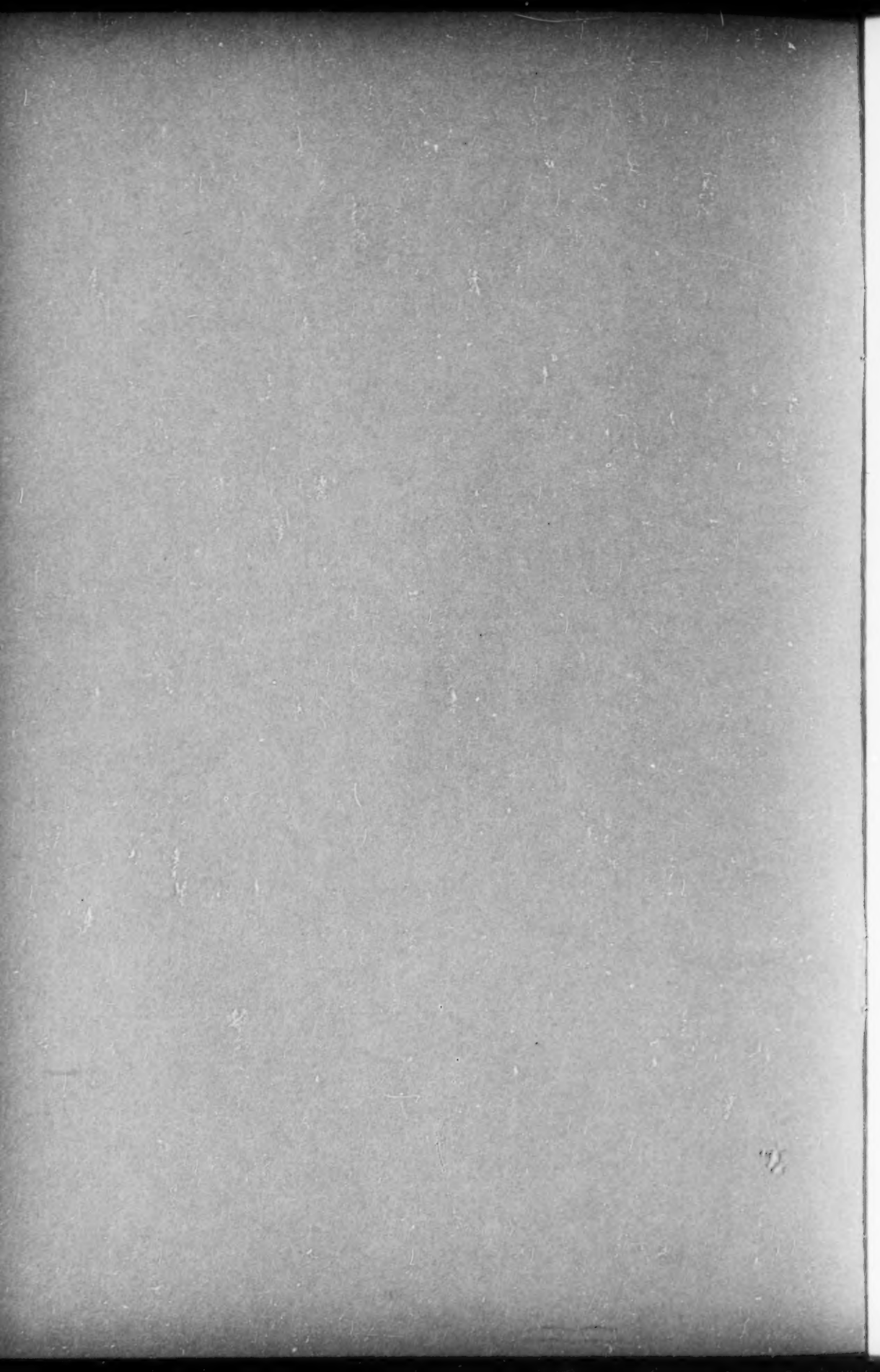


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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Pursuant to Rule 22.6, respondent is filing this supplemental brief only because the petitioner has asserted in his reply brief a reason for granting the writ which, by his own admission (Reply 1-2), he did not assert in his petition.

EVANS HAS ATTEMPTED TO MANUFACTURE A "CONFLICT" WHERE NO CONFLICT EXISTS.

In his reply brief, petitioner asserts that this Court should grant certiorari to resolve an alleged "conflict" between the decision below and a decision by the United States Court of Appeals for the Fifth Circuit in *Youngblood v. Lynaugh*, 882 F.2d 956 (5th Cir. 1989). This strained effort to fabricate a "cert-worthy" issue in his case should be rejected.

Regardless of whether the Fifth Circuit's *ex post facto* analysis is harmonious with this Court's prior decisions – and the respondent certainly does not concede that it is – the facts in *Youngblood* are hardly comparable to those in Evan's case. *Youngblood* was a non-capital case where the jury's unitary verdict was so substantively defective when rendered that, under then-existing Texas law, *Youngblood's* conviction and sentence were both void *ab initio*. 882 F.2d at 958 ("At the time *Youngblood* was convicted, the jury rendered a verdict that was unauthorized by law."). Thus, when a subsequently enacted state law was retroactively applied to *Youngblood*, the effect was to legislatively convert his void conviction and life sentence into valid judgments. Under such extreme circumstances, it is at least plausible that a

reviewing court could conclude, as the Fifth Circuit did, that Youngblood had been denied a "substantial right." 882 F.2d at 960.

Evans' case, on the other hand, is a capital case where his conviction and death sentence were, under Virginia law, presumptively valid when the jury, in a bifurcated proceeding, returned its separate verdicts. See *Peterson v. Commonwealth*, 225 Va. 289, 297, 302 S.E.2d 520, 526, cert. denied, 464 U.S. 865 (1983) ("the proceedings of the trial court are presumed to be correct unless or until they are reversed on appeal."). Unlike the situation in *Youngblood*, there was certainly no error in Evans' case which rendered either his conviction or his original death sentence void *ab initio*. And when the subsequently enacted Virginia law, which became effective *before* Evans' original death sentence was vacated, was applied to his resentencing proceeding, the effect was merely procedural, *not* substantive. As both courts below correctly recognized (App. 6a, 21a), the punishment attached to petitioner's offense was precisely the same both before and after the new law was enacted, and the amendment's only effect was to alter the procedure to be followed if and when a death sentence is judicially invalidated.

In no sense within the meaning of the *ex post facto* clause was Evans denied a "substantial right." Indeed, Evans received the very same "substantial right," *i.e.* the right to a retrial free from error, which the defendant in *Youngblood* was, according to the Fifth Circuit, impermissibly denied. See 882 F.2d at 960. Thus, *Youngblood* simply cannot form the basis for an argument that there is a "conflict" warranting certiorari review.

CONCLUSION

Petitioner committed his capital murder of a law enforcement officer almost nine years ago. When error was subsequently discovered concerning his original death sentence, that sentence was vacated by the state trial court, and in 1984 he was resentenced to death in an error-free proceeding. Since then, none of the many judges and courts which have reviewed the merits of his claims has even suggested the presence of constitutional error in his case. The supposed "conflict" which Evans has belatedly asserted in an effort to forestall the resolution of his case does not constitute a proper ground for the granting of certiorari review. For these reasons, and those set forth in the respondent's brief in opposition, Evans' petition should be denied.

Respectfully submitted,

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November 14, 1989